PUBLIC PROSECUTOR

v.

CHIENG UNG KAI

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[CRIMINAL APPEAL NO. KG. 39/92/III]
24 OCTOBER 1992

CRIMINAL LAW - Sections 465, 470 and 471 Penal Code - Forgery - Credible evidence - Knowledge or reasonable belief.

In this appeal by the public prosecutor, in which the respondent was charged under s. 471 punishable under s. 465 of the Penal Code, three grounds of appeal were raised:

(1) That the finding that the document was not a forged document was wrong in fact and in law;
(2) That there is a misdirection on the evidence of the main prosecution witness; and
(3) That the acquittal was against the weight of evidence adduced.

Held:

[1] In order to convict under s. 471, the prosecution must prove that the document was forged that the accused used such a document as a genuine one knowing or reasonably believing that it was forged.

[2] The prosecution has adduced credible evidence at the close of its case on the some of knowledge or reasonable belief on the part of the respondent. The respondent was to rebut such evidence.

[3] The evidence adduced on the ingredients of the offence could lawfully convict the respondent.

[Appeal allowed. Order of acquittal set aside. Respondent ordered to make his defence before the Magistrate.]

Cases referred to:
Munusamy v. PP [1987] 1 MLJ 492 (refd)
Lee Pin Seng v. PP [1986] 2 MLJ 416 (refd)
PP v. Yeoh Teck Chye [1981] 2 MLJ 176 (refd)
Cheong Khean Sheng v. PP [1970] 2 MLJ 175 (refd)
Haw Tua Tau v. PP [1981] 2 MLJ 491 (refd)

Legislation referred to:
Penal Code ss. 465, 470 & 471

For the appellant - Thomas Akin; DPP
For the respondent - Lin Kueh Hong; M/s. Chong Brothers Advocates

JUDGMENT

Richard Malanjum JC:

This is an appeal by the Public Prosecutor against the acquittal of the respondent without his defence being called on a charge under s. 471 and punishable under s. 465 of the Penal Code (FMS Cap. 45). The grounds of appeal of the prosecution may be summarised as follows:

(1) that the learned trial Magistrate erred in law and in fact in finding the document in question (Ex. P1) as not being a forged document;
(2) that the learned trial Magistrate misdirected himself on the evidence of the main prosecution's witness (PW5); and
(3) the acquittal was against the weight of the evidence adduced.

I must state here that the grounds of appeal as submitted are too brief as they do not cover specifically each of the reasons given by the learned trial Magistrate for making the order of acquittal. If not for item 3 of the grounds as summarised above, which is a general ground, there would have been no necessity for me to consider the other issues.

It is the case for the prosecution that by a letter dated on 25 January 1989 (Ex. P6) the respondent made a claim with the Malaysian Airlines System (MAS) on account for the loss of 13 baggages from Singapore on 27 December 1988. The prosecution alleged that when making the claim the respondent dishonestly used a document as genuine, to wit, an invoice A. No. 1216 dated 25 December 1988 with the name of Mitachi Import & Export (S) Pte. Ltd. (Ex. P1) when such document was forged. From the evidence adduced by the prosecution they show that on 27 December 1988 the respondent arrived at the Kuching International Airport from Singapore by MAS Flight MH644. When the respondent could not locate his 13 baggages he was approached by a staff of MAS by the name of Zulkifli bin Sauki (PW2). A check was made and when it proved futile PW2 told the respondent to lodge a report. Accordingly a report was taken down by PW2 from the respondent who reported that the 13 missing baggages were "trailer chains (spare parts)".

The report was made in duplicate on a form called the 'Passenger Irregularities Report' (PIR) (Ex. P3) which was signed by the respondent. The first copy was kept by MAS while the second copy was given to the respondent. The weight of the missing baggages was also calculated as 250 kilogram based on the total weight of 260 kilogram for 14 baggages less 10 kilogram which was the weight of one baggage found. Upon request the respondent also showed to PW2 his air ticket, the luggage claim tags and excess baggage coupon (Ex. P4). The respondent paid S$600 for the excess weight of his baggages. Thereafter, there appears to have been nothing much done until the respondent made his claim *vide* the letter abovementioned on 25 January 1989 (Ex. P6). Several exchanges of letters followed between the respondent and MAS Sarawak Regional Manager. The respondent also lodged a Police Report for the loss of the baggages on 21 February 1989 (Ex. P9) upon the request of the Regional Manager. In a letter dated 1 November 1989 (Ex. P10) the respondent was requested to submit the original copies of several documents including the invoice that is the subject of the charge. However I did not find any response to the letter from the respondent. There must have been none as a search had to be carried out by the Police in the office of the legal firm of Tang & Company, Sibu on 12 June 1991 (Ex. P18, 19 and 20) and the relevant documents were found.

MAS also conducted its own investigation upon receipt of the respondent's letter dated 15 January 1989 (Ex. P6) with the relevant parties including the company which name appeared on the said invoice. It was mainly the outcome of its own investigation and the contents of PIR (Ex. P3) that prompted this matter to be reported to the Police resulting in the prosecution of the respondent.

It is to be noted in the instant case that the order of acquittal was made at the close of the prosecution's case. It is therefore only at that stage of the proceeding that is to be examined with regard to the law applicable and the evidence adduced.

It is a settled law that an accused must be acquitted at the close of the prosecution's case where there is no evidence adduced by the prosecution to establish directly or by reasonable inference one or more of the ingredients of the offence for which the Accused is charged or that the evidence adduced by the prosecution against him is inherently incredible. Further, the evidence adduced must also be credible evidence to prove the essential ingredients of the offence. It does not mean that "even if the evidence on primary facts adduced by the prosecution are inherently incredible or the witnesses are found to be untruthful or unreliable, the Court must presume that they are respectively true and truthful and must in all cases call for the defence". (See:*Munusamy v. PP* [1987] 1 MLJ 492). Consequently, there is therefore a requirement on the part of the trial Judge or Magistrate to consider and evaluate all the evidence adduced by the prosecution as tested in cross-examination. But it remains a question of law whether on the evidence as adduced and unrebutted, an accused could lawfully be convicted. (See:*Lee Pin Seng v. PP* [1986] 2 MLJ 416). In *Munusamy v. PP (supra)* Mohamed Azmi SCJ puts it thus at p. 497:

> ... the Judge must ask himself on the basis of credible evidence, a mere hypothetical question: "If I were to accept the prosecution's evidence as accurate, would it establish the case against the Accused beyond a reasonable doubt?" Putting it in the "*prima facie* case" form: "On the assumption that the prosecution's evidence was accurate, could the Accused be lawfully convicted?" If the answer to either question is in the affirmative, then a case is said to have been made out which, if unrebutted, would warrant a conviction, and in such a case the Accused should be called upon to state his defence.

His Lordship also stated that it would be wrong for a Judge or Magistrate to require the prosecution to prove that the Accused is actually guilty beyond a reasonable doubt before calling for his defence. Such a requirement is to be decided at the end of the trial after the defence has given evidence and has closed its case.

In the present case on the charge under s. 471 of the Penal Code the ingredients required are as follows:

(a) Fraudulent or dishonest use of a document as genuine; and
(b) knowledge or reasonable belief on the part of the Accused using the document that it is a forged one.

In order to establish the ingredients it is for the prosecution to adduce evidence to prove the following issues:

(i) that the document was forged one;
(ii) that the Accused used such document;
(iii) that he used it as genuine one; and
(iv) that he knew, or had reason to believe, that it was a forged one.

Issues (ii) and (iii) have been ruled by the learned trial Magistrate as proved. Thus, I need not have to deal with them.

The learned trial Magistrate concluded in the instant case that he found no evidence adduced to show that the main document in question, the invoice A. No. 1216 dated 25 December 1988 (Ex. P1) was forged or that there was forgery committed on (Ex. P1) or how (Ex. P1) was forged. With respect I think the learned trial Magistrate required unnecessary additional evidence. All that is required is evidence to prove that the said document (Ex. P1) is a forged one. Section 470 of the Penal Code provides the definition of a forged document, that is, a false document made wholly or in part by forgery.

Having examined the grounds of decision of the learned trial Magistrate and the evidence adduced by the prosecution at the close of its case on the issue of whether the main document (Ex. P1) is a forged one, there are in my judgment credible evidence adduced by the prosecution which establish that (Ex. P1) is a forged document.

Clearly, there is the evidence of Mr. Lim Chin Seng (PW5). Although this witness agreed that the invoice (Ex. P1) and the seal found thereon belonged to his company, the writing and the initial were not his and he could not identify them. It is obvious from the evidence of PW5 that (Ex. P1) is an unauthorised invoice since *inter alia*, only he and his wife could issue invoices of the company, that any sale over S$2,000 required his or his wife's approval, that his company did not sell the goods mentioned in (Ex. P1) to the respondent (see: Ex. P14), that his company did not deal with walk-in customers and that his company was closed on the date (25 December 1988) as stated in (Ex. P1). As PW5 denied the authorised issuance of (Ex. P1) I do not see how it can be said that there was no credible evidence adduced at the close of the case for the prosecution to prove that (Ex. P1) was a forged document. (See:*PP v. Yeoh Teck Chye* [1981] 2 MLJ 176). (Ex. P1) told a lie about itself. (See:*Cheong Khean Sheng v. PP* [1970] 2 MLJ 175). Even if (Ex. P1) was issued by one of the employees of PW5's company it was still an unauthorised issuance and more so when there was no sale of such goods mentioned therein to the respondent. The learned trial Magistrate appears to have given undue consideration to the admission of PW5 that the invoice belonged to his company. But it was overlooked that without the writing, the seal and the initial therein, such invoices would have been useless. Thus, a blank invoice of the company of PW5 by itself may be genuine and true but the subsequent unauthorised writing, initial and affixing of the seal on the blank invoice made it a false document and comes within s. 470 of the Penal Code.

The next issues are whether the respondent knew or had reason to believe that (Ex. P1) was a forged document and had used it dishonestly. Though these issues were not specifically particularised in the grounds of appeal I am of the view that they can come under item 3 of the gist of the grounds stated earlier on in this judgment. On the issue of knowledge or reason to believe, the prosecution in my view, at the close of its case has adduced credible evidence to wit, from the circumstances established and if accepted as accurate upon which inference can be drawn. (See:*Cheong Khean Sheng v. PP (Supra)*). Firstly, there is the evidence of PW2 (Zulkifli bin Sauki) who took down the report of the respondent on the Passenger Irregularities Report (PIR) (Ex. P3). According to this witness it was the respondent himself who reported that the goods were "trailer chains (spare parts)". PW2 had no knowledge of "trailer chains (spare parts)". However, the learned trial Magistrate appears to have given undue weight on the failure by PW2 to verify with the respondent by reading back the PIR (Ex. P3) to him. By so doing the learned trial Magistrate has impliedly considered PW2 as untruthful or unreliable, in particular with regard to the making and contents of the PIR, (Ex. P3) at the close of the prosecution case without any clear basis. There was no clear reason advanced in the grounds of decision as to why the testimony of PW2 should not be believed especially on the point that what he wrote on PIR (Ex. P3) came from the respondent. (See:*Munusamy v. PP (Supra)*). Further, as a decider of fact the learned trial Magistrate "must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has

tendered such evidence, if any, by the Accused or other witnesses as it may want to call and Counsels on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance". (See:*Haw Tua Tau v. PP* [1981] 2 MLJ 491). Anyway, from the Notes of Proceeding it is clear that under cross-examination PW2 said that he did read the PIR (Ex. P3) back before he asked the respondent to sign though he did not explain it before the respondent signed. But PW2 was very positive that the respondent told him that the missing baggages were "trailer chain (spare parts)". Accordingly, if the respondent declared on the first opportunity one kind of goods yet subsequently claimed a different kind the inference is obvious at the close of the case for the prosecution as to his knowledge or belief on the authenticity of the document (Ex. P1). Incidentally, the respondent had a duplicate copy of PIR (Ex. P3) and in fact attached a copy to his letter of 25 January 1989 to MAS. The issue of incorrect entry in PIR (Ex. P3) was never raised. Even in the cross-examination of PW2 the issue was not taken up as a primary issue.

Secondly, there is the evidence of PW5 by way of (Ex. P14) stating that his company did not sell the goods mentioned in (Ex. P1) to the respondent. Such piece of evidence was not challenged in cross-examination. Thus, if there was no sale to the respondent yet there existed (Ex. P1), surely a clear inference can be drawn from such evidence as well.

There are therefore in my judgment credible evidence adduced by the prosecution at the close of its case on the issue of knowledge or reasonable belief on the part of the respondent that (Ex. P1) is a forged document. It is therefore for the respondent to rebut such credible evidence.

For a charge under s. 471, a document is used dishonestly when known or believed to have been forged, it is used as genuine with the intent that some person should thereby be deceived, and consequently either an advantage should accrue to the person so using it, or a loss to some other person. (See: Section 24 Penal Code). In the instant case there is evidence adduced by the prosecution that the respondent used (Ex. P1) to make a claim with MAS for the total sum of M$33,000. Unfortunately, I find no reason stated by the learned trial Magistrate in his grounds of decision as to why he ruled that there was no credible evidence adduced to establish dishonest use of (Ex. P1).

As there are credible evidence adduced on the ingredients of the offence charged against the respondent which on assumption they are accurate, could lawfully convict the respondent, I therefore allow the appeal, set aside the order of acquittal of the respondent and hereby order that the respondent be called upon to make his defence before the same Magistrate when notified to do so.